NO. 91 1019

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1991

WILLIAM J. CLEMONS, HOWARD C. SENTER,
LEROY BRANDENBURG, ELWOOD ROACH & J. R. ROSS
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
(Real Party in Interest) in place of Federal
Home Loan Bank Board and Federal Savings & Loan
Insurance Corporation
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the FDIC's predecessors violate the lawful rights of the petitioners, all of whom were black minority bank directors, by confiscating petitioners' certificates of deposit even though the bank for whom said certificates of deposit were pledged was not declared insolvent at the time the pledge agreement terminated?

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OPINONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is an unreported case and is printed in Appendix C hereto, infra, p.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was decided on August 20, 1991(Appendix C, infra, p.).

The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The applicable provision of the Financial Institutions Reform, Recovery and Enforcement Act of 1989("FIRREA"), abolishing both the FSLIC and FHLBB, provides in §401(f)(2) for the continuation of actions against FSLIC and FHLBB through substitution of the "appropriate successor":

CONTINUATION OF SUITS. No action or other proceeding commenced by or against the federal Savings & Loan Insurance Corporation...shall abate by reason of enactment of this Act, except that the appropriate successor to the interests of such Corporation shall be substituted for the Corporation...as a party to any

such action or proceeding.

The Fifth Amendment of the United States Constitution provides in part that:

No person... shall... be deprived of life, liberty, or property without due process of law....

STATEMENT OF THE CASE

Petitioners averred in a complaint filed on July 9, 1987(a reviver action from a former non-suited cause) that the respondent and its respective predecessors or successors in their official capacity failed to comply with the provisions of the due process clause of the Fifth Amendment of the United States Constitution and the provisions of contractual agreements between agencies of the United States Government and the petitioners.

Petitioners originally filed in Chancery Court for the State of Tennessee but at the insistance of Respondent the cause was removed to U.S. District Court as the then respondents were agencies of the U.S. government(12 U.S. C. §1437 & 12 U.S.C. § 1725) with jurisdiction vested in the federal courts pursuant to Title 28, U.S.C., Section 1331. Petitioners alledged in their complaint that they as former minority bank directors of a savings and loan institution known as Magnolia Federal Savings & Loan were arbitrarily removed from their directors position

by the respondent's predecessors without benefit of a hearing in contravention of their due process rights. That the said predecessors did infer that all certificates of deposits placed by the petitioners as original security for commencing operations as a federal savings and loan bank would be subjected to termination and all proceeds from the said certificates of deposit would pass to the office of the respondent, all without benefit of any proceedings, hearings, or other avenues whereby the petitioners might otherwise contest the actions of the repondent's predecessors. Further, that at the insistance of respondent's predecessors, the petitioners were to immediately resign their Board of Directors positions to be replaced by other directors selected by the respondent. However, respondent required as a condition for its unilateral action that petitioners enter into a substitute pledge agreement whereby all certificates of deposit held by petitioners would continue as valid instruments owned by petitioners with interest paid as specified to petitioners for the period of five years. That after five years the bank regulators were to give back to petitioners their respective certificates of deposit provided the net worth requirements of the bank was properly maintained, and not showing less than the required net worth amount as of the date of the agreement termination.

However, after the pledge agreement was signed, the petitioners were fully releived of their duties as directors of Magnolia Savings & Loan.

New directors were installed at the direction of respondent's predecessors who were not required to put up any capital contrary to that required of petitioners. Petitioners had nothing further to do with the bank in terms of operating or determining the bank's direction and/or policies.

After the passing of five years the petitioners asked for their respective certificates of deposit from the respondent's predecessors as the bank was alledgedly a prospering entity.

Petitioners were denied their respective CDs by agents of the respondent wherein the agents stated that due to the fact that Magnolia was "given" $757,200.61 in net contributions by respondent's predecessors (after) termination of petitioners as bank directors all of the CDs were to be terminated without recourse by petioners. Petitioners investigated as to why such an action could be arbitrarily manifested by respondent's predecessors and discovered:

1. That the above $757,200.61 alledgedly advanced to Magnolia after termination of petitioners as bank directors was actually placed to buy secured real estate from a member bank as mortgages and was not due and payable, and was an asset bought by respondent's predecessors directly and then placed with Magnolia not only

as an asset but also as a debt to the said bank. Why the bank regulators used this situation as an excuse or "reason" to terminate the certificates of deposit of the petitioners remains a mystery today.

2. That not one of the new directors of Magnolia were required to place any security prior or upon becoming a director of the bank.

3. That agents of the respondent would not hold any hearings for petitioners on the issue of terminating their CDs letting their arbitrary actions have the full force and effect of law.

4. That Magnolia was operating at the time of termination of petitioners' certificates of deposit as a non-insolvent bank, wherefore petitioners contend it could not have had an official designation as a bank operating below minimum net worth requirements and hence the actions to terminate petitioners' CDs were capricious, invidious, and contravened the fifth amendment rights of the said petitioners, especially since petitioners are black americans.

Petitioners sought relief in the Chancery Court for Knox County, Tennessee under principles of equity and due process. Respondent's predecessors moved for transfer of the action

to U.S. Federal District Court. The then prevailing law required that parties such as petitioners proceed through administrative channels before the action obtains "ripeness" for court review. Petitioners entered a non-suit to consider their choices. Later, petitioners recommenced their suit, supra, and proceeded with administrative review holding court action in abeyance until completed. During the administrative process the U.S. Supreme Court ruled that it was no longer necessary for administrative review to transpire before obtain a hearing on the merits in U.S. District Court.

Petitioners sought a jury trial and took depositions of respondent's predecessor. Respondent commenced an action for summary judgment which was granted by the court (without a hearing nor any presentation of oral arguments). Petitioners requested via motion for the court to reconsider, and again without benefit of a hearing nor presentation of any oral arguments the request was denied.

Appeal to the United States Court of Appeals for the Sixth Circuit was granted and arguments were held on July 16, 1991. Clemons, et al. v. Federal Deposit Insurance Corporation, 90-5309, not for publication(6th Cir. 1991).

The Court of Appeals held that it found no error warranting reversal of the lower court decision(s).

REASONS FOR GRANTING THE WRIT

It is now clear that both the Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation have been ineffectual and failed in their respective missions as evidenced by their respective abolishment via the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("Firrea").

What is also clear is the great amount of damage these two institutions have manifested in their passing wake. The fact that Magnolia Savings & Loan, a minority operated bank, has been obliberated by and under the direction of the respondent's predecessors and taken petitioners' certificates of deposit in the downfall gives rise to many questions. What is of concern to petitioners is the alledged unlawful taking of the said certificates of deposit by respondent's predecessors.

It is clear that respondent's predecessors operated under the color of law to do unlawful acts. Namely, without notice and without a hearing in violation of the due process clause the FHLBB and FSLIC did take petitioners' property. The lower court makes significant error in its decision(s) by stating that appointment of a receiver is within the purview and discretion of the respondent. This may well be, but the action of taking the certificates of deposit was outside the discretionary functions of the receiver, notwithstanding that

Magnolia was not under a receivership at the time of the forfeiture of the certificates of deposit. In fact, what had been a conservatorship was basically relegated into an operational bank with new directors appointed and serving at the pleasure of the FHLBB and the FSLIC.

Later, Magnolia while under the direction of these two said institutions and with directors appointed and operating under the auspices of FSLIC and FHLBB did fail and pass into insolvency, but not until some three years after ther termination of petitioners' certificates of deposit.

Petitioners contend that since they were denied a hearing on the issues of proper action by respondent as to petitioners' property, and precluded from any sort of lower court hearing(the lower court did not hold a single hearing for presentation of argument or evidence outside of paper submitals), that they were indeed denied their rights under the United States Constitution, this court should grant a writ of certiorari inquiring into the merits of this cause as it has novel substantial federal questions of exceptional importance; with briefs on the merits and oral argument.

Dated, this 18th day of November, 1991.

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No. _____

IN THE

SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM J. Clemons, et. al.,
Petitioners,

v.

Federal Deposit Insurance Corporation,
Respondent.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

WILLIAM J. CLEMONS, ET AL.,
PLAINTIFFS,

V. Civil No. 3-87-485

FDIC, ET AL. Filed: April 10, 1989
DEFENDANTS

MEMORANDUM OPINION

1.

Introduction

This is an action brought by seven former directors of the failed Magnolia Federal Savings & Loan Association("Magnolia") against the Federal Home Loan Bank Board("FHLBB") and the Federal Savings & Loan Insurance Corporation (FSLIC"). The complaint alleges that defendants violated plaintiffs' due process and civil rights when their savings account deposits pledged to FHLBB to insure Magnolia' net worth and the repayment by Magnolia of certain loans to the FS LIC were paid to the FSLIC without notice to plaintiffs and without a hearing. Plaintiffs allege that defendants' actions were racially motivated and that their Fifth and Fourteenth Amendment rights have been violated. The complaint seeks money damages in the amount of $ 58,051.25(the amount pledged and later paid to FSLIC), as well as $7,000,000.00 in compensatory and $7,000,000.00 in punitive damages. Plaintiffs have further filed an amended complaint

alledging that FHLBB and FSLIC violated their rights under the Fifteenth Amendment by "taking over" Magnolia, and they request that Magnolia be returned to them. Currently pending is the plaintiffs' motion requesting judicial review of an FHLBB administrative review of their claims filed in the Magnolia receviership (Court file #17) and defendants' motion to dismiss and motion for summary judgment (Court file #18)

The adminstrative action from which plaintiffs seek judicial review is a decision of the FHLBB dated September 14, 1988 affirming the denial of plaintiffs' claim by the FSLIC as receiver for Magnolia. The FHLBB found that plaintiffs could not recover under the theory that a contract existed between Magnolia and plaintiffs which purportedly required Magnolia to indemnify plaintiffs; that pursuant to Tennessee law the contractual obligation to indemnify must be established through means of a "clear and unequivocal intent"; that plaintiffs had failed to demonstrate the existence of an impled contractual provision under which Magnolia had a duty to indmnify plaintiffs; that plaintiffs had failed to demonstrate entitlement to recovery under an unjust enrichment theory; and that plaintiffs had failed to identify any statute or contractual provision entitling them to recover attorney fees. In addition to seeking review

of the final determination of the FHLBB, plaintiffs' complaint makes general allegations of violations of their civil rights under the Fifth, Fourteenth and Fifteenth Amendments to the United States Constitution.

Plaintiffs' request for judicial review of the final determination of the FHLBB is granted. Judicial review of that determination will be on a de novo basis. See, Coit Independence Joint Venture v. FSLIC, ____U.S.____(No. 87-996) (March 21, 1989)

11.

Plaintiffs' Factual Allegations

Plaintiffs' complaint alleges that they were original organizers and depositors in Magnolia; that Magnolia was governed by the FHLBB and FSLIC; that prior to September, 1977 plaintiffs were directors of Magnolia; that Magnolia began to experience financial difficulties and as a result the FHLBB imposed a conservatorship upon Magnolia; that in September, 1977, the FHLBB proposed a solution whereby, as an alternative to liquidation of Magnolia, FSLIC would enter into an "Assistance Agreement" whereby "contributions" would be made to Magnolia in an effort to preserve its existence; that as a condition of entering into this agreement the plaintiffs were required to enter into a "Substitute Pledge Agreement" whereby they pledged the principal balances of certain accounts on deposit

with Magnolia to guarantee the repayment of funds advanced to Magnolia by the defendant; that plaintiffs were informed that if Magnolia survived the period of the "Assistance Agreement" as a viable financial entity their funds would be returned to them with interest; that from 1977 until 1983, plaintiffs were heartened by reports of Magnolia's financial success; that on or about March, 1983, however, plaintiffs were notified that their accounts had been closed and that the principal balances thereof had been transferred to the FSLIC pursuant to the "Substitute Pledge Agreement:' that subsequent investigation by plaintiffs has failed to turn up any basis for the decision to pay their accounts to the FSLIC; that plaintiffs were not warned in advance of the seizure of their funds, nor were they offered a hearing prior to the confiscation; that this constituted a violation of their constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution; that their civil rights have been violated and that defendants' actions were the result of prejudice in that the plaintiffs are all of Afro-American descent; that"other" directors were allowed to operate Magnolia and not required to put up any funds as plaintiffs were; and that as a result of defendants' actions the plaintiffs have suffered severe

losses causing plaintiffs to sustain great mental anquish and emotional harm, as well as disparagement in their community.

In plaintiffs' amended complaint, they allege that the defendants, in violation of plaintiffs' constitutional rights under the Fourteenth Amendment, took over plaintiffs' bank without a proper hearing; that the defendants then replaced plaintiffs as directors with third parties who did not have to place any personal money with Magnolia as collateral; that these third parties did subsequently self-deal and make improper loans, thereby placing Magnolia in a worse financial position than before; and that in law and equity plaintiffs are entitled to have Magnolia returned to them.

III.

Legal Authorities

It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued, United States v. Shaw, 309 U.S. 495, 500-01 (1940). Such waiver cannot be implied, but must be unequivocally expressed. United States v. King, 395 U.S. 1, 4 (1969). "It is aximatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction," United States v. Mitchell, 463 U.S. 206 (1983). The sovereign immunity of the United States extends to its

agencies, Gilbert v. DaGrossa, 756 F.2d. 1455, 1460, n.6 (9th Cir. 1985), and federal agencies are not subject to to suit eo nomine unless Congress so consents. Blackmar v. Guerre, 342 U.S. 512, 515 (1952). There is a limited waiver of sovereign immunity for actions brought by an association against the FHLBB. That waiver is limited to the following:

"In the event of such an appointment (of a conservator or receiver), the association may within 30 days thereafter, bring an action in the United States District Court for the judicial district in which the home office of such association is located...for an order requiring the Board to remvoe such conservator or receiver and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver."

12 U.S. C. §1464(d)(6)(A). The following section makes it clear that §1464(d)(6)(A) is the exclusive means of bringing an action challenging the appointment of a receiver:

Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or effect the exercise of powers or functions of a conservator or receiver.

12 U.S.C. §1464(d)(6)(A).

The FSLIC and the FHLBB are federal agencies within the meaning of 28 U.S.C. §1346(b) and

are entitled to the protections of the Federal Tort Claims Act ("FTCA"), See FSLIC v. Quinn, 419 F. 2d. 1014, 1017 (7th Cir. 1969). The FTCA is a limited waiver of sovereign immunity with respect to claims sounding in tort against the United States. With respect to agencies of the United States, the FTCA expressly provides that the authority of a federal agency to sue and be sued in its own name shall not operate to permit suits under the FTCA against such agencies. 28 U.S.C. §2679(a), Only the United States may be sued under the FTCA. Blackmar, 343 U.S. at 515.

Section 2680(a) of the FTCA excludes claims against federal employees when the acts challenged are based on the performance of a discretionary function. "whether or not the discretion involved be abused." The FTCA does not bar contract claims against federal agencies. Finally, this court has subject matter jurisdiction to review claims against the FSLIC receivership on a de novo basis with or without exhaustion of plaintiffs' administrative remedy before the FHLBB first. See Coit Independence Joint Venture v. FSLIC; __U.S.___, (No. 87-996 at p. 23-24).

IV.

Analysis

Initially, the court finds that the limited waiver of sovereign immunity found in §1464(d)(6)(A) is inapplicable to the instant lawsuit.

In reviewing the record and plaintiffs' amended complaint, it is clear that the amended complaint is a challenge to the decision of the FHLBB to appoint the FSLIC as receiver of Magnolia. As §1464(d)(6)(A)(C) makes clear, §1464 (d)(6)(A) is the exclusive means of bringing an action challenging the appintment of a receiver. It does not provide for such a challenge to be made by directors or organizers of an association, but such an action must be brought by the association itself within 30 days of the appointment. Since this action does not satisfy those two prerequisites; this court lacks subject matter jurisdiction over the plaintiffs' challenge to the appointment of a receiver set out in plaintiffs' amended complaint. Accordingly, plaintiffs' claim that the FHLBB improperly placed Magnolia into receivership is outside the subject matter juridiction of this court; and the amended complaint must be dismissed.

To the extent that plaintiffs pursue a tort action against the FSLIC in its corporate capacity and/or the FHLBB, they may only do so through an action under the FTCA against the United States. They have not done so in this case and, accordingly, the court lacks subject matter juridiction over such tort claims. Even if they had filed such claims under the FTCA, those claims would be barred by the discretion-

ary function exception of the FTCA, 28 U.S.C. §2680(a), since in all of the actions challenged "there is room for policy judgment and decision ..." Dalehite v. U.S., 346 U.S. 15, 36 (1953) See also, United States v. Sa Empresa de Viacao Aerea Rio Grandensa (Varig Airlines), 467 U.S. 797(1984) ("Whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as regulator ...")

In response to defendants' argument that the United States has not waived its sovereign immunity with respect to tort claims in this case, the plaintiffs contend that their action sounds in contract rather than tort. This contention is not supported by any allegation in the complaint. See Court File #1. Plaintiffs point to no provision of the "Assistance Agreement" or the "Substitute Pledge Agreement" which has been violated. In reviewing those documents the court can find no provision which even arguably could have been violated by the FHLBB or the FSLIC. Finally, plaintifs' demand for relief seeks tort damages instead of contract damages, i.e., $7,000,000.00 in compensatory and $7,000,000.00 in punitive damages. Accordingly, plaintiffs' complaint does not state a cause of action for breach of contract against the FHLBB or the FSLIC in its corporate capacity.

Thus, any contract action against those entities by plaintiffs will be dismissed.

With respect to plaintiff' claim that they have been deprived of due process of law by the ex parte appointment of the receiver, the Supreme Court held in Fahey v. Mallonee, 332 U.S. 245 (1947), that such an appointment wss constitutional and did not constitute a taking of property without due process.

With respect to any other constitutional claims, and it is difficult for the court to understand what those claims are because of the imprecision in pliantiffs' complaint, the complaint again fails to state a claim upon which relief might be granted. Such claims could not be brought under any of the civil rights statutes, see 42 U.S.C. §1983, 1985, and 1986, since it is certain that the FSLIC and the FHLBB were acting under color of federal law rather than state law, and that they are not "persons" within the meanings of those statutes. Although plaintiffs might allege that jurisdiction can be asserted over the United States under the substantive provisions of the Constitution itself, Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), this argument has been rejected when the defendant named in the suit or the real party in interest was a federal agency or the United States itself. United States v. Testan, 424 U.S. 392 (1976). In Testan, the Court held that,

In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument...that all substantive rights of necessity create a waivier of sovereign immunity such that money damages are available to redress their violation. 424 U.S. at 400-01. Accordingly, I am of the opinion that all tort, contract and constitutional claims in this case should be dismissed.

However, plaintiffs are entitled to a judicial review of the final determnation of the FHLBB on plaintiffs' claim against the FSLIC as receiver of the failed association. As indicated earlier, that review is to be de novo, and the subject matter of the review is whether Magnolia had any express or implied contractual duty to indemnify the plaintiffs for their losses, whether Magnolia was unjustly enriched, and whether plaintiffs are entitled to recover their attorney fees in this matter. As the court' review of the final agency decision is to be de novo, this court is of the opinion that the parties should be afforded the opportunity to supplement the record with any relevant evidence not contained in the present record of the adminsitrative determination within 30 days from the date of the entry of this order. In addition, if any party believes that evidence in the form of testimony is necessary

for resolution of this lawsuit, he/it should notify the court within 30 days.

V.

Conclusion

In light of the foregoing, the plaintiffs' motion for judicial review of the final determination of the defendant FHLBB (Court file # 17) is GRANTED; the defenants' motion to dismiss and for summary judgment (Court file #18) is GRANTED IN PART and DENIED IN PART consistant with this opinion.

Order Accordingly.

JAMES H. JARVIS
UNITED STATES DISTRICT JUDGE

NO._____

IN THE

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OCTOBER TERM, 1991

WILLIAM J. CLEMONS, ET AL.,
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VS.

FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENTS.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE:NORTHERN DIVISION

WILLIAM J. CLEMONS, ET AL.,

V.

Civil No. 3-87-485

FEDERAL HOME LOAN BANK BOARD, ET AL.,

Filed:December 5, 1990

MEMORANDUM OPINION

This is an action brought originally by seven former directors of the failed Magnolia Federal Savings & Loan Association("Magnolia") against the Federal Savings & Loan Insurance Corporation("FSLIC"). Later the FSLIC, as receiver for the failed Magnolia, was permitted to intervene as a defendant. In a Memorandum Opinion entered on April 10, 1989(Court file # 21) this court granted in part defendants' motion for summary judgment and dismissed plaintiffs' contract, tort, and constitutional claims. However, at the same time, the court recognized plaintiffs' only remaining claim: Plaintiffs' claim of entitlement to de novo review of the final determination of the FHLBB on plaintiffs' claims against the FSLIC as receiver for the failed Magnolia. This court further noted that the subject matter of the review is (1) whether Magnolia had any express or implied contractual duty to endemnify the plaintiffs for their losses; (2) whether Magnolia was unjustly enriched; and (3) whether plaintiffs are entitled to recover attorney fees from receiver. Currently

pending is the motion to substitute FDIC as Manager of the FSLIC Resolution Fund for FSLIC as receiver for Magnolia (Court File #43. Also pending is FDIC's motion for summary judgment (Court File #43).

1.

THE MOTION TO SUBSTITUE FDIC FOR FSLIC/RECEIVER

In August, 1989, the United States Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), abolishing the FSLIC. FIRREA § 401(a)(1). In addition, effective 60 days from the enactment of FIRREA, the FHLBB is abolished. FIRREA § 401(f)(2) provides for the continuation of actions pending against FSLIC through substitution of the "appropriate successor":

CONTINUATION OF SUITS,-No action or other proceeding commenced by or against the Federal Savings & Loan Insurance Corporation...shall abate by reason of enactment of this Act, except that the appropriate successor to the interests of such Corporation shall be substituted for the Corporation...as a party to any such proceeding.

Since the FSLIC was appointed as receiver for Magnolia prior to January 1, 1989, the appropriate successor to the interests of FSLIC as receiver for Magnolia is the FDIC as Manager

of the FSLIC Resolution Fund. FIRREA § 215. Plaintiffs agree that FDIC is the appropriate defendant in this case. Accordingly, defendants' motion to substitute is GRANTED; and the FDIC as Manager of the FSLIC Resolution Fund will be substituted for the FSLIC as receiver of Magnolia..

II.

Factual allegations of the Plaintiffs

Plaintiffs' complaint alleges that they were original organizers and depositors in Magnolia; that Magnolia was governed by the FHLBB and FSLIC; that prior to September, 1977 plaintiffs were directors of Magnolia; that Magnolia began to experience financial difficulties and as a result the FHLBB imposed a conservatorship upon Magnolia; that in September, 1977 the FHLBB proposed a solution whereby, as an alternative to liquidation of Magnolia, FSLIC would enter into an "Assistance Agreement" whereby "contributions" would be made to Magnolia in an effort to preserve its existence; that as a condition of entering into this agreement, the plaintiffs were required to enter into a "Substitute Pledge Agreement" whereby they pledged principal balances of certain accounts on deposit with Magnolia to guarantee the repayment of funds advanced to Magnolia by the defendant;

that plaintiffs were informed that if Magnolia survived the period of the "Assistance Agreement" as a viable financial entity, their funds would be returned to them with interest; that from 1977 until 1983, plaintiffs were heartened by reports of Magnolia's financial success; that on or about March, 1983, however, plaintiffs were notified that their accounts had been closed and that the principal balances thereof had been transferred to the FSLIC pursuant to the "Substitute Pledge Agreement"; that subsequent investigations by plaintiffs have failed to turn up any basis for the decision to pay their accounts to the FSLIC; that plaintiffs were not warned in advance of the seizure of their funds, nor were they offered a hearing prior to the confiscation; that this constituted a violation of their constitutional rights under the Fifth and Fourteenth Amendments ot the United States Constitution; that their civil rights have been violated and that defendants' actions were a result of prejudice in that plaintiffs are all of Afro-American descent; that "other" directors were allowed to operate Magnolia and not required to put up any funds as plaintiffs were; and that as a result of defendants' actions, the plaintiffs have suffered severe losses causing plaintiffs to sustain great mental anquish and emotional harm, as well as disparagement in

their community.

Plaintiffs sought administrative review of a decision of the FSLIC denying their claims against Magnolia in the Magnolia receivership. Upon administrative review, the FHLBB denied those claims and plaintiffs sought judicial review of the administrative decision. (Court file #17). It is this claim for judicial review that is the remaining claim in this action.

III.

Summary Judgment Standards

Pursuant to Rule 56, summary judgment shall be rendered when requested if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. It is the burden of the party seeking summary judgment to show this court that, under the uncontradicted facts, the moving party is entitled to judgement as a matter of law. Summary judgment is intended to provide a quick, inexpensive means of resolving issues to which there is no dispute regarding the material facts. Celotex Corp. v. Catrett, 477 U.S. 317(1986). "(T)he mere existence of some factural dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Id.

IV.
ANALYSIS

Plaintiffs filed claims against the FSLIC receivership of Magnolia seeking damages equal to the amounts of the pledged accounts which they lost. See R.41-45. Although the plaintiffs did not indicate it in their proofs of claims, the theories under which they sought to recover from the FLSLIC were determined by the FHLBB to be: (1) that Magnolia had an express or implied contractural duty to indemnify the plaintiffs for their losses; (2) that Magnolia was unjustly enriched; and (3) that plaintiffs were entiled to recover their attorney fees from the receiver. This determination was made based upon the contents of an earlier state court action brought by the plainiffs against the receiver of Magnolia. These are the three claims that remain before this court, and the only remaing defendant is FDIC as Manager of the FSLIC Resolution Fund.

1. Indemnity. In Tennessee, the right to indemnity must be established by either an express contractural relationship or by implication. Houseboat Incorporation of America v. Marshall, 553 S.W. 2d. 588(Tenn. 1977). The substitute pledge agreement in this case contains no express language establishing an indemnification relationship between Magnolia and the plaintiffs. Therefore, if indemnification exists in this case it exist by implication.

In order for an indemnification right to arise by implication, there must be a clear and unequivocal express of intent to indemnify. First American Bank of Nashville v. Woods, 734 S.W. 2d. 622(Tenn. Dt. App. 1987)

There is nothing in the record to evidence any intention on behalf of Magnolia to indemnify the plaintiffs. In fact, the testimony of the plaintiffs taken by deposition makes it clear that there was no promise to indemnify by Magnolia. Defendant has taken the depositions of plaintiffs Clemons, Senter, Ross Brandenburg, Johnson and Roach.[1] Each of these plaintiffs was asked whether any-one at Magnolia expressly agreed to pay them back for the amounts in the accounts which were transferred to the FSLIC or did anything that would give the plaintiffs that impression. Each of these plaintiffs responded "No". See Exhibits E-F attached to defendants' Suuplemental Memorandum (Court File #50). Thus it is clear that there are no circumstances under which the duty to indemnify by implication might be proven by the plaintiffs.

2. Unjust enrichment. Under Tennessee law, unjust enrichment has the following elements:

(a) A benefit conferred upon a defendant by the plaintiff;

(b) Appreciation by the defendant of such benefit; and

No deposition of defendant(should be plaintiff) McArthur was taken since he apprently died recently.

c) Acceptance of such benefit under such circumstances that it would be inequitable for the defendant to retain the benefit without payment of the value thereof.

See Estate of Adkinson v. Allied Fence and Improvement Company, Inc., 746 S.W. 2d. 709 (Tenn, Ct. App. 1988) The substitute pledge agreement was executed for the purpose of insuring the repayment of FSLIC's loans to Magnolia and to insure Magnolia's net worth. If Magnolia were forced to indemnify plaintiffs, it would vitiate this second purpose. Circumstances do not render it inequitable that Magnolia not be required to indemnify the plaintiffs for their losses. The theory of unjust enrichment simply has no applicability in this case.

3. Attorney fees. With few exceptions, the rule in Tennessee is that attorney fees are not recoverable absent a statute or contract specifically providing for such recovery. Pullman Standard, Inc. v. Standard, 693 S.W. 2d. 336, 338 (Tenn. 1985). The Supreme Court of Tennessee has recognized an exception to this rule for those cases in which an implied indemnity is found. Id. In the instant case, there is no contractual or statutory entitlement to attorney fees. Since it is clear from Part 1 above that plaintiffs are not entitled to recover compensatory damages under an indemnity theory they are similarly not entitled to recover any at-

torney fees under an indemnity theory.

V.

CONCLUSION

In light of the foregoing, defendant's motion to substitute the FDIC as Manager of the FSLIC Resolution Fund for FSLIC as receiver for Magnolia Savings & Loan (Court file #43) is hereby granted; in addition, since no question of material fact remains to be determined and defendant FDIC is entitled to judgment as a matter of law, the pending motion for summary judgment (Court file #43) is hereby GRANTED.

Order accordingly

JAMES H. JARVIS
UNITED STATES DISTRICT JUDGE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

William J. Clemons, et. al.,
Petitioners,

v.

Federal Deposit Insurance Corporation,
Respondent.

APPENDIX C.

Not for Publication

90-5309

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED: AUGUST 20, 1991

WILLIAM J. CLEMONS, ET AL., Plaintiffs-Appellants,	ON APPEAL FROM THE UNITED STATES
v.	DISTRICT COURT
FEDERAL DEPOSIT INSURANCE CORPORATION,	FOR THE EASTERN DISTRICT OF TENN-
DEFENDANT-APPELLEE	ESSEE

EFORE: KEITH, Circuit Judge; WELLFORD, Senior Circuit Judge; GADOLA, District Judge:

Per Curiam: William J. Clemons, et al. appeal from the district court's April 10, 1989, orders granting summary judgment in favor of the Federal Deposit Insurance Corporation.

Having carefully considered the record and the arguments presented in the briefs and orally, we find no error warranting reversal. We, therefore, AFFIRM the orders of the Honorable James H. Jarvis, United States District Judge for the Eastern District of Tennessee, for the reasons set forth in his Memorandum Opinions and Orders.

The Honorable Paul V. Gadola, United States District Judge for the Eastern District of Michigan sitting by designation.

NO._____

IN THE

SUPREME COURT FOR THE UNITED STATES

_____

OCTOBER TERM 1991

_____

WILLIAM J. CLEMONS, ET AL.,
PETITIONERS,

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENT.

_____

APPENDIX D.

_____

FILING AND MAILING CERTIFICATE:

I, William Clemons, hereby certify that on this 18th day of November, 1991, I filed with the Clerk's Office of the Superme Court of the United States the foregoing Petition for Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below.

Mr. Gregory E. Gore, Attorney at law
FDIC
550 17th St.. N.W.
Washington D.C. 20429

William J. Clemons
WILLIAM J. CLEMONS
2416 Louise Ave.
Knoxville, Tn. 37923
(615) 525-5929

I, William Clemons, hereby certify that on this 5th day of December, 1991, I mailed three copies of the foregoing Petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D.C. 20530

William J. Clemons
WILLIAM J. CLEMONS
2416 Louise Ave.
Knoxville, Tn. 37923
(615) 525-5929